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Walter Karabian

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CALIFORNIA'S IMPLIED CONSENT STATUTE: AN EXAMINATION AND EVALUATION

*by Walter Karabian**

On October 6, 1966, California became the forty-third state to adopt an implied consent statute. The implied consent statute provides, in part, that "any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. . . . If any such persons refuses . . . to submit to a chemical test . . . the department . . . shall suspend his privilege to operate a motor vehicle for a period of six months."¹ Little did the author of the bill and its proponents realize that, in less than two years, this law would cause more controversy and be the source of more litigation than any other motor vehicle legislation in the history of California.

The intent of this article is to point out some of the issues raised during the first 15 month period of the law's existence. The case law with regard to this statute is developing. Presently, there are no appellate decisions which have interpreted any of its provisions; there are, however, many cases on appeal testing the validity of the statute and its enforcement procedure. The proceedings by which the Department of Motor Vehicles presently determines whether an individual has violated the provisions of the implied consent statute are legally defective and abusive of the rights of those who fall within its scope. This major defect, however, is not without immediate legislative remedy. This article will focus on such abusive procedures and will recommend and discuss needed reform.

I. LEGISLATIVE HISTORY

At the 1966 First Extraordinary Session of the California Legislature, Senator Randolph Collier introduced Senate Bill 3, which subsequently became known as the "Implied Consent Act."² This measure culminated approximately 13 years of effort by law enforcement officials.

*Member of the Assembly, California Legislature; Mr. Karabian serves on the Assembly Judiciary Committee. A.B., University of Southern California, 1960, J.D., 1963, M.S., 1965; member of the California Bar. The author gratefully acknowledges the assistance of Donald C. Green, Consultant to the Assembly Committee on Constitutional Amendments.

¹CAL. VEH. CODE § 13353 (West Supp. 1967). This section and accompanying section 13354 are set out in full in the appendix.

²CAL. S. B. 3, 1st Ex. Sess. (1966) (Collier).

After its introduction in the Senate, the bill was amended twice before receiving that body's approval.³ It was to receive its greatest opposition, however, in the various committees of the Assembly to which it was assigned for consideration. The Assembly Committee on Criminal Procedure held numerous hearings on the bill before it received the minimum number of "do pass" votes. Debate before that Committee was arduous and marked with a considerable number of sharp exchanges between the proponents of the bill and those who opposed its enactment. Several amendments were proposed which were subsequently incorporated in the language of the bill; some of these were later removed.⁴

Because the measure involved state expense, it was then referred to the Assembly Committee on Ways and Means, where once again its path was marked by extensive debate and lengthy testimony. The Ways and Means Committee held numerous hearings on the bill, during which time it was further amended.⁵ The Committee finally approved the bill by a very narrow margin and sent it to the floor of the Assembly for final consideration by the membership of that house. By the time the bill was finally approved by 50 of the 80 members of the Assembly, it had been amended on six different occasions.⁶ Upon concurrence of the Senate in the Assembly amendments, the bill was signed by Governor Edmund G. Brown on June 30, 1966.⁷

During the course of the bill's movement through the Legislature, it was the subject of some of the most controversial debate in recent years. Unfortunately, to survive the many attacks and tests imposed by the Legislature, the bill underwent many changes which today have made it far from universally acceptable.

II. CONSTITUTIONAL QUESTIONS

The cases presently pending before the California Court of Appeal question the constitutionality of the present statute on many grounds. It is not within the scope of this article to analyze these questions in depth; however, a discussion of the implied consent statute would not be complete without a brief consideration of these issues.

The Court in *Schmerber v. California*⁸ stated that the taking of blood

³CAL. S. JOUR. 181-82 (daily ed., Mar. 14, 1966); CAL. S. JOUR. 327-28 (daily ed., Apr. 4, 1966).

⁴CAL. A. JOUR. 1039-42 (daily ed., May 6, 1966).

⁵CAL. A. JOUR. 1186 (daily ed., May 17, 1966); CAL. A. JOUR. 1236 (daily ed., May 19, 1966).

⁶CAL. A. JOUR. 1331-43 (daily ed., May 31, 1966).

⁷Cal. Stats. 634, ch. 138 (1st Ex. Sess. 1966).

⁸384 U.S. 757 (1966).

must be incidental to a lawful arrest in order to satisfy fourth amendment standards.⁹ The provisions of subdivisions (b) and (c) of the implied consent statute may be subject to constitutional attack in that the standards by which the Department must judge the question of refusal do not require a finding that the arrest be lawful or a finding that the chemical test was to be administered incidental to the lawful arrest.¹⁰ Although the provisions of subdivision (a) of section 13353 of the California Vehicle Code make it clear that the fourth amendment requirements of reasonable cause, lawful arrest, and proximity of the test to such arrest must be met, the standards set forth in subdivisions (b) and (c) for the administrative procedure do not repeat those requirements. Thus, key elements which are crucial to fourth amendment rights are omitted.¹¹

Still others are arguing that before the officer can request the licensee to submit to a chemical test, he must warn him of his right to remain silent, his right to have an attorney present during interrogation, and his right to be provided an attorney if he cannot afford to engage one of his own. It is contended that the officer must warn the licensee that the right to remain silent is not the right to refuse to participate in such a test,¹² and unless all such warnings are given, the refusal may not be introduced as evidence in the proceeding under the implied consent statute.

The question of knowledgeable waiver of constitutional rights has also been raised in cases involving licensees who, it has been alleged, were too intoxicated to understand the directions of the officer and were unable to either consent to or refuse a chemical test or to knowingly waive other constitutional rights.

One other objection to the current procedures under which the implied consent statute is being enforced is that the licensee is not permitted to consult with his attorney prior to making his determination whether to submit to a test. Those who advocate that the licensee should be permitted to consult with his attorney argue that it is required as a matter of constitutional law. Moreover, they contend that an attorney is necessary to inform the licensee of the provisions of the statute and his alternatives, of which of the three tests is most reliable, of his right to an independent test, of his right to privacy, of his right to refuse if he suffers from certain illnesses or is taking certain medication, and of his right to have a duly licensed physician, nurse, or laboratory technician administer the test.

⁹*Id.*

¹⁰CAL. VEH. CODE §§ 13353(b),(c) (West Supp. 1967).

¹¹See CAL. A. JOUR. 1186 (daily ed., May 17, 1966).

¹²See *People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).

Increasingly, the argument is being made that a driver's license is a right and not a privilege. It is generally contended by those who so advocate that it is tantamount to a property right. Many contend that the act of driving an automobile is so intimately related to the enjoyment of life, liberty, and the pursuit of happiness, and the acquisition, management, and protection of property that it is entitled to the protection of due process of the law as required by the fourteenth amendment of the United States Constitution. Others contend that the license, once granted, becomes a vested right in the holder and that it cannot be revoked or suspended arbitrarily or capriciously. Those who state that a driver's license is a privilege and not a right insist that the right to operate automobiles is not a natural and unrestrained right but a privilege, subject to reasonable regulation under the police power in the interests of public safety and welfare. The resolution of this question, however, may no longer be necessary since the distinction between right and privilege as far as conditioning the exercise of a constitutional right may no longer be meaningful.¹³

III. DEPARTMENT OF MOTOR VEHICLES PROCEDURE

A. *Affidavits of Reasonable Cause*

California Vehicle Code section 13353 requires that the Department of Motor Vehicles make the determination as to whether the driver has refused to submit to a chemical test as required by the statute.

The procedure by which the Department makes this determination is quite simple. The arresting officer submits to the Department a sworn statement attesting that he had reasonable cause to believe the licensee was driving a motor vehicle upon a California highway while under the influence of intoxicating liquor, that he asked the licensee to submit to any of the three tests provided by the statute, that he warned the licensee that failure to submit would result in suspension of his license, and that the licensee refused to submit to such a test. Upon receipt of the officer's sworn statement, the Department makes a finding as to whether the standards for suspension have been satisfied.¹⁴

This procedure by which the Department determines whether there has been a refusal has caused great concern among members of the Bar and the general public. The Department uses driver improvement analysts, Grade III, with no legal training to make the initial decision as to the

¹³See *Keyshian v. Board of Regents*, 385 U.S. 589 (1967); *Vogel v. County of Los Angeles*, 68 Cal. 2d, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).

¹⁴*Hearings on the Subject of Implied Consent Before the Assembly Interim Committee on Criminal Procedure* (Oct. 9, 1967) [hereinafter referred to as *Hearings*].

sufficiency of the affidavit.¹⁵ This determination includes the finding that there was sufficient reasonable cause for the officer to make the arrest. Oddly, if the analyst finds the affidavit lacking, he does not dismiss the action, but merely returns the affidavit to the officer for correction or supplementary facts which will rectify the deficiency.¹⁶ Mr. Robert Rauschert, Administrative Supervisor of the Department of Motor Vehicles, testifying before the Assembly Interim Committee on Criminal Procedure at a public hearing conducted in Los Angeles on October 9, 1967, described the procedure utilized by the Department in the following testimony:¹⁷

MR. RAUSCHERT: After enactment of the implied consent statute, the Department . . . proceeded to suspend licenses under this law upon receipt of a written statement of a police officer that a licensee suspected of drunk driving had refused to consent to a chemical test, whether blood, breath, or urine, to determine its chemical content. The Department acts to suspend a driver's license only on those affidavits that are deemed sufficient. In other words, the Department acts in a manner comparable to that of the District Attorney. We weigh the affidavit to decide whether an action should result. Now . . . on those affidavits which we do feel sufficient to suspend, hearings are held upon request of the licensee pursuant to section 14100 and following of the Vehicle Code. In accordance with the licensee's request, it may be either formal, that is, with a transcript, or informal, wherein no transcript is taken. In other words, no reporter is present at the hearing, nor is there a tape recorder present. These hearings are presided over by a driver improvement analyst, who is an employee of the Department of Motor Vehicles. All appeals from the Department action suspending a driver's license are handled by the Office of the Attorney General. . . .

I wish to call your attention to the fact that Department action through the date of October 2, reveals that the Department has received 9,406 affidavits from police officers. From the 9,406 received, 7,896 suspensions were

¹⁵The exact title of the individual who analyzes the affidavits to determine whether they satisfy the standards required is Department of Motor Vehicles Division of Drivers' Licenses Driver Improvement Analyst, Grade III; this individual is sometimes referred to as a department supervisor. There are five grades in the department. The individual who conducts the *formal* hearing is a Driver Improvement Analyst, Grade II, which is an interesting fact. The individual who conducts the informal hearing is a Driver Improvement Analyst, Grade I. The basic requirement for this position is that the analyst must have been a driver's license *examiner*. After having served as a driver's license examiner for one year, he is then eligible for the examination for Grade I. After a year in that grade, he is eligible for Grade II, and, after another year, he is eligible to take the exam for Grade III, and so forth. All promotions are based on competitive examinations, and the positions are civil service.

¹⁶The department is returning approximately 20% of all the affidavits received as being unsatisfactory. Of the 20% returned to the peace officer or the police department, approximately one-third are resubmitted.

¹⁷Hearings, *supra* note 14.

ordered. That is, approximately 1,510 affidavits were returned because of insufficiency of the affidavit. . . . In other words, the police officer makes out the affidavit, and as it is reviewed at the Division of Drivers' Licenses, it is found that there is not adequate information as to reasonable and probable cause which the Department form requires. He didn't have reasonable and probable cause to arrest or that he didn't recite to the licensee that he had the option of the three tests.

ASSEMBLYMAN KARABIAN: You mean the Department of Motor Vehicles makes the determination as to whether reasonable or probable cause existed even if the officer has arrested him?

MR. RAUSCHERT: We return the affidavit. In the form the Department uses, there is a requirement . . . to have the arresting officer spell out some of the causes . . . [that] caused him to stop this individual or put him under arrest, which, for example, would be weaving, or that he stopped the car on the highway for some violation of the travels law, due to the conduct of the driver of the vehicle, and thereafter, the officer would probably state that when he stopped him, he had the odor of alcohol, and so on. And if this is not present, the affidavit is returned to the Police Department and the police officer to see if the affidavit could be corrected or if he had other information which might bring it up to a standard which is acceptable for a hearing.

ASSEMBLYMAN MILLER: Mr. Rauschert, you indicated that, at some time in the procedure, somebody determines that the affidavits of the officers are not up to standard and that it should be sent back. Who makes that determination?

MR. RAUSCHERT: This is done in the Division of Drivers' Licenses by one of the supervisors.

ASSEMBLYMAN MILLER: Are these determining supervisors legally trained?

MR. RAUSCHERT: They are not attorneys to my knowledge. They are employees of the Department, but I doubt whether they are attorneys. . . . In fact, I do not know any that are.

The use of driver improvement analysts to determine the sufficiency of the officer's affidavit is the first stage of the Department proceedings in which the licensee could be subjected to serious abuse. The fact that these persons are not legally trained and are inexperienced in the determination of legal questions is causing considerable rancor and doubt among the Bar as to the just character of the suspensions imposed. The existence of reasonable cause to believe the licensee was driving under the influence of intoxicating liquor is only one of the many legal questions which require some familiarity with the law.

One of the most significant results of the Criminal Procedure Committee's investigations was the statistical information elicited from the Department of Motor Vehicles. The Department estimated that, during the first fifteen months of the implied consent law, 14,738 affidavits were received from law enforcement agencies alleging that licensees had re-

fused to take the chemical test.¹⁸ Of these, 2,551 were not acted upon by the Department either because the affidavit was insufficient or because conviction of the driver for violation of California Vehicle Code section 23102(a) would be the second such conviction, and under the law, the licensee would have his license automatically suspended.¹⁹

The very essence of this article focuses on the 12,187 persons whose licenses were suspended by the Department of Motor Vehicles during the first 15 months of the implied consent statute. A startlingly high number of drivers—7,700—did not request a Department hearing; thus, their licenses were revoked by the Department.²⁰ These 7,700 persons lost their driving privileges for a six month period solely on the basis of an affidavit filed by a law enforcement officer and a determination made by a non-legally trained analyst from the Department of Motor Vehicles. For those thousands who never seek a Department hearing, the analyst's judgment is not subject to the review of the employees who conduct the Department hearings, much less that of a district attorney, lawyer, or judge. There is grave doubt in this author's mind as to the legal validity of the suspensions imposed by the Department.

No doubt, many factors contributed to the failure of these 7,700 persons to request a Department hearing. The expense of being away from one's place of employment as well as the inconvenience of participating in a governmental proceeding may have discouraged many. Counsel is not provided under the statute; there were probably those who did not proceed because they could not afford an attorney and felt inadequate without representation. As in all governmental proceedings, it is likely that a sizable number did not take advantage of the hearing procedure simply because they were ignorant of the law. Certainly, the automatic suspension of the license appeared to the layman as a routine function of government and was a major factor in preventing any further litigation of the issue.

B. *Department Hearings and Hearing Officers*

Subsections (b) and (c) of the statute set forth the mechanics for departmental hearings on license suspensions. If the affidavit is deemed sufficient, the Department is required to suspend the operator's license for a period of six months. Written notice of that finding is transmitted to the licensee; he is also notified of his right to request, within ten days, a hearing before a Department employee on the Department's action. Failure to request a hearing results in the suspension taking effect on the tenth day

¹⁸Letter from Mr. Robert Rauschert to the author, Feb. 2, 1968.

¹⁹*Id.*

²⁰*Id.*

after receipt of such notice.²¹

An application for hearing has the effect of staying the suspension for a period of 15 days, during which time the person must be granted a hearing by the Department. Pursuant to the Vehicle Code sections governing departmental hearings, the licensee has the choice of either an informal or a formal hearing.²² Failure to provide a hearing within that period serves to further stay the suspension until such time as the licensee has been given an opportunity for hearing. The licensee may request a continuance; however, the suspension takes effect upon the date the request for continuance is granted.²³

A major criticism of the present implied consent law concerns the hearings conducted by the Department. Much of the procedure is contrary to a lay person's concept of governmental administration, and many of the practices and qualifications of the personnel involved have been subject to pointed criticism by members of the Bar.

The Department hearing assumes an atmosphere of injustice and unfairness from the beginning. California Vehicle Code section 14107 governs who shall conduct the hearing. It states:

Whenever the department grants a formal hearing as provided in this part, the department shall fix a time and place for hearing as early as may be arranged in the county where the applicant or licensee resides, and shall give 10 days notice of the hearing to the applicant or licensee, except that the hearing may be set for a different place with the concurrence of the applicant or licensee and the period of notice may be waived.

Any formal hearing shall be conducted by the director or by a referee or hearing board appointed by him from *officers or employees of the department*. (emphasis supplied).

The Department has, in effect, taken the emphasized language of section 14107 literally. As pointed out to the Assembly Criminal Procedure Committee by Department of Motor Vehicles representatives, the Department is using driver improvement analysts, Grade II, to conduct all formal hearings.²⁴ The qualifications of such persons to conduct or preside at such proceedings was the subject of considerable discussion before the Committee.

The testimony of Mr. Rauschert and Mr. E. Keith Ball, Chief, Division of Drivers' Licenses, Department of Motor Vehicles, indicates the groping inability of the Department to make the hearings resemble a judicial proceeding:²⁵

²¹CAL. VEH. CODE §§ 13353(b),(c) (West Supp. 1967).

²²See CAL. VEH. CODE § 14100 *et seq.* (West Supp. 1967).

²³CAL. VEH. CODE § 13353(c) (West Supp. 1967).

²⁴Hearings, *supra* note 14. The Department refers to these hearing officers as referees.

²⁵Hearings, *supra* note 14.

ASSEMBLYMAN SIEROTY: What are the qualifications' of those hearing officers?

MR. RAUSCHERT: Those are driver improvement analysts. The Civil Service Board has established a certain criteria or requirements which they must meet. But I might state this from my own knowledge; these are men and employees of the Department who are not attorneys, but they have had experience in cases insofar as a negligent operator is concerned, for example.

ASSEMBLYMAN SIEROTY: What is their experience with probable cause?

MR. RAUSCHERT: Well, sir, I believe as far as probable cause is concerned that under the implied consent law, this is the first time they have been concerned with that.

MR. E. KEITH BALL: As a matter of precedent, hearing officers in the Department of Motor Vehicles have been chosen in the past for quite a different purpose. They have been chosen because of their training and ability to determine physical skills and ability to handle motor vehicles, and our hearings in the past, other than financial responsibility, have been largely based on this. Because of physical and mental conditions of the drivers, these people needed to be well grounded in the requirements for the safe operation of a vehicle. Now, for the first time, we got into a new field, and it has taken time for these people to adjust to this.

ASSEMBLYMAN KARABIAN: Is a hearing officer instructed at all as to any of the guidelines that a court must follow—for instance, that the man before him is innocent until proven guilty; does he have the same restrictions placed upon him?

MR. E. KEITH BALL: Basically, and this has been emphasized by the people in the Attorney General's Office and by Mr. Rauschert particularly, for all our hearing officers. I think you all recognize the situation in which this hearing officer finds himself—weighing the information being presented to him by an officer of the state or an officer of the city, a duly appointed peace officer, against an individual. Under the circumstances, this has to be balanced out and weighed carefully—the facts and evidence as it is submitted. I think this, by its very nature, the way it is written in the law, contemplates or at least sets the officer in a favorable light in these circumstances.

This testimony of the Department representatives supports the contention of many lawyers and of this author that the hearing officers are not qualified to pass judgment on such serious matters. The Department states that this is the first time it has been confronted with a requirement that its hearing officers make this kind of determination. Considering the serious penalty involved, the risk of error or misjudgment on the part of the driver improvement analyst is far too great to tolerate.

The standards by which the hearing is to be conducted and the issues which must be decided are set forth in subsection (c) of the statute.²⁶

²⁶CAL. VEH. CODE § 13353(c) (West Supp. 1967).

First, the hearing officer must determine whether the peace officer had reasonable cause to believe the driver had been operating a motor vehicle upon a highway while under the influence of intoxicating liquor. The question of reasonable cause is a complex issue, requiring a legal conclusion based on factual circumstances.²⁷ It is submitted that there is no precise definition of reasonable cause even though the courts are wrestling with it daily; it is a difficult determination for judges at all levels. In implied consent proceedings, a driver improvement analyst functions in a quasi-judicial capacity without the legal training required. That the hearing officer can base his conclusion on the sworn statements of the peace officer and findings of the analyst who considered that officer's affidavit does not in any way rectify the matter. Neither of these individuals is in any better position to make such a legal determination.

Secondly, the hearing examiner must find that the licensee was in fact placed under arrest. The conclusion that an arrest was effected requires not only knowledge of the circumstances of the particular case but also some understanding of the law of arrest. Although the former may be elicited from the peace officer who originally stopped the individual, the latter requires training and experience which a driver improvement analyst probably lacks.

The third issue which the hearing examiner must decide is whether the arresting officer properly requested the driver to submit to a chemical test. This issue encompasses a determination of several questions: 1) whether the suspect was in fact requested to submit to a test; 2) whether he was advised of his rights and choices in connection with the request; 3) whether he was informed of the penalty for refusal to submit to such a test; and 4) whether a failure on the part of the driver to understand the officer's explanation should be considered by the examiner. Implicit in these decisions will be the hearing officer's evaluation of the credibility of the witnesses. As pointed out in the Committee hearings quoted above, where the suspect's testimony is at variance with that of the arresting officer, the latter's version will probably be accepted as fact.

The last finding the examiner is required to make is whether the driver in fact refused to submit to such a test. This issue has caused the most controversy in those cases presently before the Court of Appeal. The absence of a blood, breath, or urine sample is not, in itself, conclusive proof of the individual's refusal to submit to a test. Other factors, such as a request for counsel or a lapse of time before submission to a test, may be

²⁷See CAL. PEN. CODE § 836 (West Supp. 1967); *People v. Stewart*, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965); *People v. Ruhman*, 224 Cal. App. 2d 284, 36 Cal. Rptr. 493 (1964).

relevant to this consideration. Driver improvement analysts are not trained to make such determinations. Moreover, as courts decide these questions, the examiners will lack the legal understanding necessary to apply these precedents.

Although Department hearings are guided by rather informal evidentiary rules, the licensee does have the right to object to the introduction of evidence and to cross-examine the witnesses for the state.²⁸ Therefore, concern arises as to the driver improvement analyst's familiarity with the rules of examination, cross-examination, and evidence.

The objections are many from those who contend the present Department procedure places the hearing officer in the position of both prosecutor and judge, thus preventing a fair consideration of the facts and impeding an impartial determination. Although the Department hearing is not a trial, permitting the hearing officer to present the prosecution side of the case as well as to make the final determination runs contrary to our scheme of justice. This procedure, in and of itself, without any necessity of showing bias in fact, denies the petitioner a fair and impartial hearing. It is difficult for this author to see how one can advocate a position and yet remain impartial in determining the facts.

The use of agency employees to conduct or preside over departmental or agency hearings is a problem which the California Legislature faced in 1961. In that year, it enacted the provisions which set up the Office of Administrative Procedure and charged that office with the responsibility of conducting all hearings held pursuant to the provisions of the California Administrative Procedure Act.²⁹ Although many Department of Motor Vehicles proceedings are governed by that Act, hearings held pursuant to the implied consent statute do not come within its protections.³⁰

Prior to establishing a separate agency to govern hearings held under the Administrative Procedure Act, the Senate Interim Committee on Administrative Regulations and Adjudications studied this problem and, in its 1959 report, stated:³¹

... the fact that the hearing officer is an employee of the investigating and prosecuting agency with the attendant control over the original appointment, assignment of duties, promotion, performance reports, pay, vacation, sick leave

²⁸In a formal hearing, the licensee may object to the introduction of evidence. See CAL. VEH. CODE § 14108 (West 1960). However, informal proceedings are not governed by similar rules. See CAL. VEH. CODE § 14104 (West Supp. 1967).

²⁹CAL. GOV. CODE § 11500 *et seq.* (West 1966).

³⁰CAL. VEH. CODE § 13353(c) (West Supp. 1967). *But see* Gross v. State Dept. of Motor Vehicles, Civ. No. 911456, L.A. Sup. Ct. (Feb. 29, 1968).

³¹SENATE INTERIM COMMITTEE ON ADMINISTRATIVE REGULATIONS AND ADJUDICATIONS, 1 Appendix to CAL. S. JOUR. 7 (Reg. Sess. 1959).

and layoff or demotion are sufficient in and of themselves to instill into such hearing officers enough desire to please the agency and to adopt and institutionalize an approach which cannot help but reflect itself into some fact-finding processes.

In summary, the Committee concluded:

The public is entitled to have hearing officers participate in all fact-finding processes on the administrative level, who are as far divorced as possible from the sphere of agency influence, where the agency concerned is also charged with the responsibility of administering and enforcing the law.

The concerns expressed by the 1959 Senate Interim Committee are applicable to the present procedures being employed by the Department of Motor Vehicles in its implementation of the implied consent statute.

The licensee has the power to appeal the administrative decision to the courts by way of mandamus. Statistics demonstrate, however, that this is a seldom used, impractical remedy. The 1959 Senate Interim Committee reported:³²

Even with judicial review as a deterrent, it does not in practice give adequate protection to the many persons who for financial reasons cannot afford to seek judicial relief.

It is estimated that fully 97% of the rights which are adjudicated are finally settled at the administrative level. This, of course, is a strong indication that there is no general dissatisfaction with the manner of exercise of agency function. But it is also a mandate that the persons who, for their own reasons, do not seek relief in the judicial branch, should be granted every opportunity for fair and equal justice before the agency tribunal. . . . [T]he litigant should be granted every opportunity for a fair, equal, and unbiased determination of such facts.

Some proceedings involving Department of Motor Vehicles hearings are presided over by lawyers from the Office of Administrative Procedure. These hearings generally involve revocation, renewal, or suspension of business licenses, such as those of driving school instructors, vehicle salesmen, or automobile dismantlers, and are conducted pursuant to the requirements of the California Administrative Procedure Act.³³ That Act sets out the qualifications for the position of a hearing officer. California Government Code section 11502 states:

All hearings of state agencies required to be conducted under this chapter shall be conducted by hearing officers on the staff of the Office of Administrative Procedure. The presiding officer of the Office of Administrative Procedure has power to appoint a staff of hearing officers for the office as provided in Section 11370.3 of the Government Code. *Each hearing officer shall have been admitted*

³²*Id.*

³³CAL. VEH. CODE §§ 11111, 11803, 11509 (West Supp. 1967).

to practice law in this state for at least five years immediately preceding his appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved. (emphasis supplied).

These requirements differ considerably from those required for the position of driver improvement analyst. Because of this difference, it is this author's belief that individuals requesting Department hearings pursuant to the implied consent statute receive inequitable treatment.

Illustrating the numerous examples of inequities resulting from the difference in procedure is the case of an automobile salesman whose business license is suspended under California Vehicle Code section 11802. The business license suspension hearing is conducted by a legally-trained individual pursuant to the Administrative Procedure Act.³⁴ If the same salesman has his driver's license suspended under the implied consent statute, his hearing is conducted by a non-lawyer who must make what essentially is a legal decision. A comparison of the two procedures by which these licenses, both crucial to the salesman, are suspended by the Department raises the basic inequity of the present statute. The vehicle salesman in one instance involving his business license receives all the procedural safeguards afforded by the California Administrative Procedures Act, but in the other hearing, he must submit to a procedure which is conducted by an individual who has received no formal education or experience in resolving questions of reasonable cause or validity of arrests and is not trained in the measure or quality of evidence required.

In order to sell cars, one must possess a vehicle salesman license,³⁵ however, the law requires automatic suspension of this license upon termination of his employment.³⁶ Since a driver's license is a practical prerequisite to selling automobiles, loss of that license is tantamount to loss of employment.

The glaring and obvious question is whether the Legislature recognized a valid distinction between the vehicle salesman losing his business license in a proper proceeding and the same individual losing his driver's license, which would result in the loss of his business license, as a result of a procedure with none of the same procedural safeguards before a non-legally trained officer. There is no available evidence that the Legislature even considered this point.

It appears to the author that the 1964 Legislature made a basic and

³⁴CAL. VEH. CODE § 11803 (West Supp. 1967).

³⁵CAL. VEH. CODE § 11800 (West Supp. 1967).

³⁶CAL. VEH. CODE § 11805 (West 1960).

fundamental error when it assigned the task of formal hearings to employees within the Department of Motor Vehicles rather than to legally-trained officers under the Administrative Procedure Act. Its inability to recognize the resulting problems may well cause the demise of the implied consent statute.

C. Penalty

Another often criticized feature of the statute is the inflexibility of its provisions, since there is no discretion to vary the length of the suspension.³⁷ Numerous cases of qualified refusal have come to this author's attention, and several are pending before the Court of Appeal. Among these are the cases of an individual who desires to take a test but wishes to consult with his attorney before making a choice, and of the individual who refuses to give a second sample where the first is incomplete or inadequate, as in the case of the urine test. Perhaps the most frequently occurring qualified refusal involves the individual who initially refuses and, then, shortly thereafter, desires to take the test. No provision is made for the person who refuses due to a failure to understand the officer's statement, or out of fear or ignorance. Moreover, in keeping with the inflexibility of the statute, no exception has been made for the individual whose very livelihood is dependent upon his driver's license. It has been argued that all offenders should be treated equally, but this author believes judicial discretion better protects the interests of society.

The inequitable result is further illustrated by comparing this inflexible suspension provision with the punishment which can be imposed under Vehicle Code section 23102(a) for a first offense conviction. There, the court is vested with discretionary power to consider the circumstances of the individual's record and the possible hardship that would result and can tailor the sentence to the individual. Under the implied consent statute, the Department is compelled to suspend for six months the operator's license of an individual who has refused to submit to a chemical test.

Many individuals who have had their licenses suspended by the Department under the implied consent statute have later been found not guilty of the drunk driving offense by the court. Unfortunately, the Department of Motor Vehicles does not keep records reflecting the incidence of this problem. Spokesmen for the Department have stated that this statistic is irrelevant to their proceedings since the offense of driving under the influence is in no way related to the offense of failure to submit to the

³⁷CAL. VEH. CODE § 13353 (West Supp. 1967).

test.³⁸ That one can be found not guilty of the crime which the statute was enacted to deter, yet still incur a suspension of six months for failing to submit to the chemical tests, is abhorrent to this author's sense of fair play and justice.

D. *Right of Appeal*

A licensee can appeal a decision of the Department of Motor Vehicles to the Superior Court by writ of mandamus.³⁹ Statistics, however, reflect that relatively few have taken advantage of the appeal procedure. Of the more than 12,000 license suspensions imposed by the Department during the first 15 months of this statute, only 332 writs of mandamus challenging the decision of the Department were filed.⁴⁰ To properly pursue this remedy, it is almost imperative that one engage an attorney to represent his interests. Most of those who do not pursue this course of action lack the necessary funds.

Of the 332 writs filed challenging the Department decision, many were based on informal hearings.⁴¹ This fact is important since there is no record made of the informal proceeding; the judge in the mandamus action is without the benefit of a record to review. Thus, it is this author's contention that an individual who seeks a writ of mandamus from an informal hearing has less chance of obtaining satisfaction from the court than one whose writ is taken from a formal Department hearing because errors in the Department proceedings are less obvious where there is no record.

Although courts are handicapped by lack of a record in many cases, the results of the mandamus proceedings during the first 15 months of the implied consent law have been startling. Of the 332 writs filed, 152 had been decided by December 29, 1967. Of these, 53, or approximately 35 percent, were decided in favor of the licensee.⁴² This high rate of re-

³⁸Hearings, *supra* note 14.

³⁹California Vehicle Code section 14400 states:

Nothing in this code shall be deemed to prevent a review or other action as may be permitted by the Constitution and laws of this State by a court of competent jurisdiction of any order of the department refusing, canceling, suspending, or revoking the privilege of a person to operate a motor vehicle.

Under this provision, it is possible to have a review of the Department's action in suspending a driver's license by a writ of mandate to the Superior Court. *Escobedo v. State Dept. of Motor Vehicles*, 35 Cal. 2d 870, 222 P.2d 1 (1950).

The scope of this judicial review is unsettled. Whether the petitioner is to receive a trial de novo or whether the court should merely review the Department's findings on the basis of the evidence presented at the Department hearing is yet to be resolved. The fact that many of the Department hearings are informal (without a transcript) impedes the resolution of this question. *See* CAL. CODE CIV. PROC. § 1094.5 (West 1967).

⁴⁰Letter from Mr. Robert Rauschert to the author, Feb. 2, 1968.

⁴¹*Id.*

⁴²*Id.*

versal compels this author to the significant and inescapable conclusion that the Department proceedings are creating serious injustice in California.

A complete statistical analysis of the cases handled by the Department of Motor Vehicles under the implied consent law through December, 1967, was provided by the Department.⁴³ It is this author's conclusion that those statistics are a clear indictment of the present Department proceedings.

During the first 15 months of the statute, of the 4,487 licensees who requested and received a Department hearing, only 199 suspensions were set aside at this level.⁴⁴ The other 4,288 were upheld by the hearing examiner. Less than 4.5 percent of those who requested and received a hearing obtained a favorable decision. During the same period, 35 percent of those petitions for writ of mandate which were decided by the Superior Courts resulted in reversing the Department action. It is likely that had more licensees petitioned the court for review, the number of reversals would have been higher. It is disconcerting to consider that, of the 3 percent having the resources to contest the original notice of suspension all the way to the courts, 35 percent received a favorable result. There is room for improvement in the present system.

Of the 152 cases which have been decided by the Superior Courts, 58 have been appealed to the Court of Appeal. This figure includes both appeals by the Department and by the licensee. At this writing, none of these cases has been decided.

IV. REFORM

A. *Proposed Amendment*

The following bill, A.B. 750,⁴⁵ has been introduced by the author in an attempt to revise the current procedure by which a determination is made on the question of the licensee's refusal to submit to a chemical test. The proposed amendment is as follows:

The People of the State of California do enact as follows:

Section 13353 of the Vehicle Code is amended to read:

13353. (a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and administered at the direction of a

⁴³*Id.*

⁴⁴*Id.*

⁴⁵Cal. A.B. 750, Reg. Sess. (1968) (Karabian).

peace officer having reasonable cause to believe such person was driving under the influence of intoxicating liquor. Such person shall be told that his failure to submit to such a chemical test *may* result in the suspension of his privilege to operate a motor vehicle *for a period not to exceed six months or a fine not to exceed two hundred and fifty dollars (\$250.00)*.

The person arrested shall have the choice of whether the test shall be of his blood, breath or urine.

Any person who is dead, unconscious or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent and such tests may be administered whether or not such person is told that his failure to submit to the test *may* result either in the suspension of his privilege to operate a motor vehicle *for a period not to exceed six months, or a fine not to exceed two hundred and fifty dollars (\$250.00)*.

Subsections (b) and (c) are deleted.

Proposed subsection (b) shall read:

(b) In any case in which a complaint has been filed alleging such person has violated Section 23101 or 23102 of this code, a complaint may be filed in a municipal or justice court in the county in which the alleged violation of Sections 23101 or 23102 occurred, by the People within 30 days alleging (1) that such person was lawfully arrested for a violation of Sections 23101 or 23102 of this code, (2) that the person arrested was informed that he had a right to choose any of the three tests provided by this section, (3) that an opportunity was provided to such person to submit to the test of his choice, (4) that the test was to be administered incidental to such arrest, (5) that such person was told that his failure to submit to a chemical test may result in the suspension of his privilege to operate a motor vehicle for a period not to exceed six months, or a fine not to exceed two hundred and fifty dollars (\$250.00), and (6) that such person refused to submit to a test.

A hearing shall be held within 30 days of the filing of the complaint. Such person, if unable to afford counsel, shall be provided with counsel for the purposes of this hearing. If the court finds all of the allegations of the complaint to be true beyond a reasonable doubt, the court may suspend the operator's license of such person for a period not to exceed six months, or may impose a fine not to exceed two hundred and fifty dollars (\$250.00). The court shall within 10 days after making such finding send an abstract thereof to the department.

Subsections (d), (e), and (f) have been renumbered as (c), (d), and (e).

The most important aspect of the proposed revision of the present implied consent statute is the transfer of the determination of refusal from the Department of Motor Vehicles to the courts. Because the issue of refusal carries with it grave consequences, such as loss of license, severe economic hardship, and, in many cases, loss of employment, it should be resolved before a competent trier of fact whose impartiality is clearly recognized.

The proposed amendment makes several changes in subdivision (a) of section 13353. It is clearly misleading for a peace officer to inform a licensee that his failure to submit to a chemical test "will" result in the suspension of his privilege to operate a motor vehicle. This is a determination that must be made by a governmental agency or a court and not by the officer. The revision would substitute the word "may" for the word "will" in the admonition given by the peace officer at the time he requests the licensee to submit to a chemical test, thus making the admonition as accurate and precise as possible.

Several alternative changes have been suggested by local bar associations in California.⁴⁶ Full analysis of those proposals is beyond the scope of this article. However, support does exist in those proposals for the recommended substitution of the word "may" for "will" in subdivision (a).

Complaint

Under the proposed amendment, either a county counsel or a district attorney⁴⁷ may file a complaint alleging a violation of the implied consent statute if a complaint has been filed alleging the licensee had violated Vehicle Code sections 23101 or 23102. By permitting the counties to choose whether the county counsel or the district attorney will prosecute violations of this statute, the counties would be in a better position to allocate their resources.

The language of the bill is permissive in that the district attorney or county counsel is not required to file the complaint. The purpose of making the provision permissive is to give those individuals the necessary discretion to determine whether there is sufficient evidence to support a violation of the implied consent statute. It is submitted that placing this authority in the hands of the county counsel or district attorney is far superior to the present procedure. Instead of a non-lawyer driver improvement analyst making the initial determination with regard to the satisfaction of the standards imposed by the statute, a lawyer with considerable experience in the handling of such matters and in determining whether sufficient evidence exists to warrant prosecution would be vested with this important power.

Further, it is anticipated that prosecution and defense lawyers will be in a better position to determine the rights of a licensee and the facts

⁴⁶Proposed resolution by the Santa Clara Bar Association to the California State Bar Association, September, 1967.

⁴⁷District Attorney and County Counsel are used herein as examples. Their use is not intended to exclude other appropriate agencies.

of the case. Presumably, a licensee who initially refuses to submit to a test but who later decides to plead guilty to the offense of drunk driving will not suffer further penalty of loss of his license. Moreover, since the purpose of the implied consent law as argued by its proponents is to establish the truth of the facts, this result would promote that objective.

The provision vesting the charging authority in the county counsel or the district attorney was included because of the nature of the proceedings. The proceeding under this amendment cannot be said to be criminal in the usual sense in which that term is used since there is no penalty of incarceration. On the other hand, it cannot clearly be labeled a civil proceeding because penal sanctions can be imposed. In short, this proceeding is "quasi-criminal."

Court Hearing

The proposed amendment requires that the complaint be filed in a municipal or justice court in the county in which the alleged offense of drunk driving occurred. Municipal and justice courts were selected because they are the courts in which most traffic matters, including misdemeanor drunk driving offenses, are tried. Such courts are familiar with the procedures required for the trial of such proceedings.

There were many complaints from peace officers who objected to the requirement in the present statute that Department hearings shall be held in the county in which the licensee resides.⁴⁸ Sending the peace officer to the licensee's county of residence to appear at the Department hearing has resulted in considerable expense to the taxpayer. The county in which the offense takes place is generally the jurisdiction in which such actions are tried. Therefore, it is felt that the hearing on the issue of refusal should be held in the county in which the alleged drunk driving offense took place; otherwise, both the peace officer and the district attorney or county counsel would be required to travel to the county of the licensee's residence.

The amendment requires that the complaint for violation of the implied consent statute must be filed within 30 days of the filing of the complaint on the drunk driving offense. This provision is designed both to give the licensee a speedy hearing and to assure society that if it is found that the licensee violated the statute, his license will be suspended at the earliest date.

Standards

The standards required by the proposed amendment significantly re-

⁴⁸Hearings, *supra* note 14.

vises the existing standards governing Department hearings. Under the amendment, the possible defects in subdivisions (b) and (c) of the present section which do not require a finding that the arrest was lawful and that the test was to be administered incidental to that lawful arrest have been eliminated. This change, designed to clarify existing standards, will correct possible constitutional deficiencies which exist in the present statute. Additionally, it is provided that the prosecution must demonstrate that all three tests were available. This provision was added to ensure that the arresting officer both informed the licensee of his right to submit to any of three tests and provided him with an opportunity to submit to the test of his choice. Many cases have been brought to the author's attention where the arresting officer or police department did not have the necessary facilities and equipment to administer all of the tests.

Burden of Proof

The proposed amendment requires that the prosecution prove beyond a reasonable doubt that the above standards have been met. It is this author's opinion that these proceedings are more criminal than civil. Increasing the burden of proof is intended to ensure the licensee that his rights have been adequately protected and that the question of refusal has been justly decided.

Independent Hearing

This amendment is not intended to impair the independent nature of the present proceedings, but rather, to change the forum. Under the proposed revision, the hearing on the question of refusal would be entirely separate from the proceeding involving the alleged violation of the drunk driving statute. Some consideration was given to combining the two questions into the drunk driving trial, but it was decided to maintain their separate nature. Although the author is aware that two proceedings will be an added cost to the licensee in his defense, it is felt that the two questions are of a separate nature and that the hearing on the issue of refusal should be decided independently.

Right to Jury Trial

The California Constitution provides for the right to a jury trial in both criminal and civil proceedings.⁴⁹ A problem may arise, however, in determining whether the implied consent proceeding is criminal or civil for the purposes of jury trial. If it is deemed a criminal proceeding, conviction will require a unanimous verdict; if the proceeding is deemed civil, three-fourths of the jury may render the verdict. Although a violation of

⁴⁹CAL. CONST. art. I, § 7.

this section does not constitute a misdemeanor, it is this author's belief that the implied consent hearings will be considered in the nature of a criminal proceeding. Requiring the burden of proof to be the same is intended to ensure that the defendant will receive all the rights of a defendant in a criminal trial, including the protection of a unanimous verdict.

Right to Counsel

In California, a driver's license is a practical necessity. It has too often been the case that persons have lost their operator's license because they were unable to afford counsel to represent their interests. The role of counsel can be very important in eliciting the facts, in cross-examining the witnesses for the State, and in marshalling evidence for the licensee. In contemporary times when highly sophisticated techniques are being used for the purpose of determining intoxication and for apprehension and arrest, it becomes even more important that the defendant in a case such as this be adequately represented. The purpose of this provision is to ensure that all licensees receive adequate and equal representation before the tribunal which will make the ultimate determination.

It is possible that the public defender, in those counties maintaining a public defender's office, will represent the interests of the indigent licensee before the court. This, however, will depend on a determination as to the nature of the proceedings.

Discretion in Imposing Sanctions

One of the most important features of the proposed reform is that of investing the court with discretion to vary the length of the license suspension or fine according to the facts in the individual case. One of the greatest defects of the present statute is the inflexibility of the penalty provision. It is argued by the proponents of the original bill and by those who oppose any change in sanctions that this rigid penalty is a necessary deterrent to refusals to submit to the test. This conclusion is, at the least, disputable and, in this author's opinion, not persuasive. It is submitted that those who propose the retention of such a rigid penalty cannot demonstrate that it is any greater deterrent to refusing a chemical test than a provision that would provide the court with discretion. Few criminal sanctions divest the court of the power to consider the facts and circumstances of the case, such as the man's prior record and his occupation, as does the present statute.

It is submitted that discretion in the sentencing procedure is a necessary protection to the interests of society and the individual in assuring that the sentence is tailored to the individual and not the act. In California, the

penal system is based on the indeterminate sentence concept.⁵⁰ Under this concept, the statute focuses on the individual and not the crime. The present statute is contrary to that philosophy, and the proposed reform would rectify the present inconsistency.

The proposed reform gives the court complete discretion and flexibility in determining the appropriate sanction where the licensee is convicted of violating the implied consent statute. The court could theoretically find the licensee guilty and impose no sanction, or it could impose license suspension or fine. However, no sanction can exceed the limits prescribed.

Alternative Costs

Although there will be added cost to the courts in administering this proposal, the benefits such a reform will have on the present procedure far outweigh that cost. Removing this determination from the Department of Motor Vehicles and transferring it to the courts may, in fact, result in only a slight net increase in expense to the State.

If, in the alternative, it is decided that the Department should employ legally trained hearing officers, as are presently being used in the Office of Administrative Procedure, the added cost to the State would be inordinate. It is estimated by the Department of Motor Vehicles that at least 15 attorneys, at an estimated cost of \$248,000 per year, would be necessary to preside as hearing officers.⁵¹ That figure is based on the number of hearings held during the first fifteen months of experience under the present statute. The cost would be at least that amount if the proceedings were to be governed by the Administrative Procedure Act with Office of Administrative Procedure hearing officers conducting the implied consent hearings. Added costs would be incurred, however, since the Department would be required to provide a representative at those hearings. It is submitted, however, that merely adding lawyers to the Department of Motor Vehicles to act as hearing officers for the purposes of this section would only partially solve the problem. Non-legally trained driver improvement analysts would continue to make the initial determination as to the satisfaction of present standards. The hearing officers would still be employees of the Department with the attendant lack of impartiality and independence that that relationship can foster. This is an unsatisfactory solution.

V. CONCLUSION

Assembly Bill 750 will not satisfy all the critics of the implied consent

⁵⁰[Eds.] See Mosk, *The Eighth Amendment Rediscovered*, 1 LOY. U. L. REV. 4 (1968).

⁵¹Letter from E. Keith Ball, Chief, Division of Drivers' Licenses, Department of Motor Vehicles to the Assembly Interim Committee on Criminal Procedure, Jan. 16, 1968.

statute. There are those who believe the entire concept of this law is repugnant to our scheme of justice. Nevertheless, this author believes that within the framework of the implied consent statute, certain improvements can be made which will guarantee to each citizen a fair and just hearing. Furthermore, California's staggering highway death rate reinforces the argument that our society must conscientiously make every effort to protect the innocent and strive to remove the menace of the drunk driver from our highways. Assembly Bill 750, by removing the hearing from the Department of Motor Vehicles and placing it in the courts where it properly belongs, will create, if nothing else, a far more equitable means of resolving questions pertaining to a driver's refusal to take a chemical test.

The bill is the ideal for which this author and others will strive. The bill may undergo certain amendments that will either strengthen or dilute its provisions; however, this author has every expectation that the essential reforms expressed in the bill will be implemented as a major refinement of California's implied consent statute.

The guarantees embodied in Assembly Bill 750 can and must become the law of California. The protections the public rightfully expects in judicial proceedings must be injected into the important area of implied consent adjudication.

APPENDIX

California Vehicle Code section 13353 provides:

(a) Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, breath or urine for the purpose of determining the alcoholic content of his blood if lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor. The test shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. Such person shall be told that his failure to submit to such a chemical test will result in the suspension of his privilege to operate a motor vehicle for a period of six months.

The person arrested shall have the choice of whether the test shall be of his blood, breath or urine.

Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent and such tests may be administered whether or not such person is told that his failure to submit to the test will result in the suspension of his privilege to operate a motor vehicle.

(b) If any such person refuses the officer's request to submit to a chemical test, the department, upon receipt of the officer's sworn statement that he had reasonable

cause to believe such person had been driving a motor vehicle upon a highway while under the influence of intoxicating liquor and that the person had refused to submit to the test after being requested by the officer, shall suspend his privilege to operate a motor vehicle for a period of six months. No such suspension shall become effective until 10 days after the giving of written notice thereof, as provided for in subdivision (c).

(c) The department shall immediately notify such person in writing of the action taken and upon his request in writing and within 15 days from the date of receipt of such request shall afford him an opportunity for a hearing in the same manner and under the same conditions as provided in Article 3 (commencing with Section 14100) of Chapter 3 of this division. For the purposes of this section the scope of the hearing shall cover the issues of whether the peace officer had reasonable cause to believe the person had been driving a motor vehicle upon a highway while under the influence of intoxicating liquor, whether the person was placed under arrest, whether he refused to submit to the test after being requested by a peace officer, and whether, except for the persons described in paragraph (a) above who are incapable of refusing, he had been told that his driving privilege would be suspended if he refused to submit to the test.

An application for a hearing made by the affected person within 10 days of receiving notice of the department's action shall operate to stay the suspension by the department for a period of 15 days during which time the department must afford a hearing. If the department fails to afford a hearing within 15 days, the suspension shall not take place until such time as the person is granted a hearing and is notified of the department's action as hereinafter provided. However, if the affected person requests that the hearing be continued to a date beyond the 15-day period, the suspension shall become effective immediately upon receipt of the department's notice that said request for continuance has been granted.

If the department determines upon a hearing of the matter to suspend the affected person's privilege to operate a motor vehicle, the suspension herein provided shall not become effective until five days after receipt by said person of the department's notification of such suspension.

(d) Any person who is afflicted with hemophilia shall be exempt from the blood test required by this section.

(e) Any person who is afflicted with a heart condition and is using an anticoagulant under the direction of a physician and surgeon shall be exempt from the blood test required by this section.

(f) A person lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle under the influence of intoxicating liquor may request the arresting officer to have a chemical test made of the arrested person's blood, breath or urine for the purpose of determining the alcoholic content of such person's blood, and, if so requested, the arresting officer shall have the test performed. California Vehicle Code section 13354 governs the taking of the tests. It provides:

(a) Only a physician, registered nurse or duly licensed clinical laboratory technologist or clinical laboratory technician acting at the request of a peace officer may

withdraw blood for the purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of breath specimens.

(b) The person tested may, at his own expense, have a physician, registered nurse, duly licensed clinical laboratory technologist or clinical laboratory technician or any other person of his own choosing administer a test, in addition to any administered at the direction of a peace officer, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his blood, breath or urine. The failure or inability to obtain an additional test by a person shall not preclude the admissibility in evidence of the test taken at the direction of a peace officer.

(c) Upon the request of the person tested full information concerning the test taken at the direction of the peace officer shall be made available to him or his attorney.

(d) No physician, registered nurse or duly licensed clinical laboratory technologist or clinical laboratory technician shall incur any civil or criminal liability as a result of the proper administering of a blood test when requested in writing by a peace officer to administer such a test.

(e) If the test given under Section 13353 is a chemical test of urine, the person tested shall be given such privacy in the taking of the urine specimen as will insure the accuracy of the specimen and, at the same time, maintain the dignity of the individual involved.

(f) The Department of the California Highway Patrol, in cooperation with the Department of Public Health or any other appropriate agency, shall adopt uniform standards for the giving of blood alcohol tests.

